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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

JAN 31 1974
MICHAEL RODAK, JR., CLERK

ERNEST C. HAMILTON, ALVIN D. EVANS, DR. KENNETH LEE PEREGO, LLOYD E. HENNIGAN, JR., PHILIP J. SHAHEEN, JR., and DR. WILSON D. MORRIS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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ERNEST C. HAMILTON, ALVIN D. EVANS, DR. KENNETH LEE PEREGO, LLOYD E. HENNIGAN, JR., PHILIP J. SHAHEEN, JR., and WILSON D. MORRIS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, ERNEST C. HAMILTON, ALVIN D. EVANS, DR. KENNETH LEE PEREGO, LLOYD E. HENNIGAN, JR., PHILIP J. SHAHEEN, JR., and DR. WILSON D. MORRIS, through their respective undersigned counsel, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered on October 25, 1973, affirming their convictions for alleged violations of

Title 18, United States Code, Sections 1341 and 371 relative to using the mails for the purpose of executing a scheme to defraud and conspiring to do so.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix A, submitted herewith under separate cover. There were no written opinions of the United States District Court for the Eastern District of Louisiana relative to petitioners' motions for a speedy trial, their motions to dismiss the prosecution for want or prosecution, or their motions for a judgment of acquittal grounded upon their assertion that the Government's case, at best, showed multiple conspiracies and therefore was at variance with the allegations made in the indictment. The Trial Court granted judgments of acquittal upon the Counts charging mailings related to one collision upon the asserted ground, also unreported and unwritten. With that exception, the motions were denied.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Fifth Circuit was rendered on October 25, 1973. Thereafter, petitions for rehearing and for rehearing *en banc* were timely filed. These petitions were denied on January 2, 1974. (Appendix B, submitted herewith under separate cover) The Court below, on January 7, 1974, entered an order granting petitioners a stay of the issuance of the mandate pending this application for a writ of certiorari, which stay expires on February 15, 1974, unless extended by this Honorable Court upon the filing of this application. (Appendix C)

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1). See, also, Rule 19(1)(b) of the Rules of this Honorable Court. Jurisdiction of this Court to extend the stay beyond the period granted by the Court below is invoked under Rule 51 of the Rules of this Honorable Court.

QUESTIONS PRESENTED

1. Whether petitioners were denied their Sixth Amendment right to a speedy trial?

2. Whether the Government's evidence revealed a single overall conspiracy or a multitude of conspiracies of a similar nature, so that petitioners' motions for judgment of acquittal, or in the alternative, their motions for severance, should have been granted?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, Speedy Trial Clause; Rules 14 and 29(a) of the Federal Rules of Criminal Procedure; and the jurisprudence construing those provisions.

The Sixth Amendment Speedy Trial Clause, in relevant part, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial * * *.

Rule 14, F.R.Cr.P., provides:

> If it appears that a defendant or the

government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance or defendants or provide whatever other relief justice requires.

Rule 29(a), F.R.Cr.P., in relevant part, provides:

> * * * The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

STATEMENT OF THE CASE

A. *The Speedy Trial Issue.*

The record in this case is replete with delays occasioned by inactivity either of the Government or of the Trial Court following the filing of pretrial motions by the petitioners and their co-defendants. The crucially significant delays are discussed herein.

Petitioners were not arraigned until nearly six weeks after the indictment in this cause was returned. They were then given thirty days within

which to file special pleadings. Petitioner Hennigan went to the arraignment armed with his pretrial pleadings. The arraignment of some unrepresented defendants among whom was Petitioner Evans, was continued until they could obtain counsel. In the case of Petitioner Evans, he was unable to obtain the assistance of counsel; the same was appointed for him for the purpose of arraignment. Under the circumstances of that appointment wherein counsel was not assigned responsibility for filing pretrial motions for Petitioner Evans, the Court granted him and the defendants in similar circumstances sixty days within which to file special pleadings. Because of the different dates upon which the defensive pleadings were due, following the motion of Petitioner Hamilton for additional time within which to file his pleadings, the Court *sua sponte* entered an Order fixing February 8, 1968, as the deadline for all defendants' motions. Six days before this Order was entered, Petitioner Shaheen had filed numerous motions, among which was a motion for a speedy trial. Upon the basis of the Court's subsequent Order fixing a single deadline

date, the Government moved for an Order by the Trial Court continuing the hearings on Petitioner Shaheen's motions which had previously been noticed for hearing on January 10, 1968. The motions of Petitioner Hennigan and Petitioner Shaheen, filed before the Court even entered the Order fixing February 8, 1968, as the deadline for the filing of all defense motions, set the theme of nearly all the pretrial motions filed in this case at this stage of the proceedings. Very little of a different nature was interjected by pretrial motions of any other defendant in this cause. Only Petitioner Morris and defendant Breaux untimely filed their motions. Counsel for defendant Breaux was not appointed until February 14, 1968—six days after the deadline previously fixed by the Trial Court for the filing of motions. Defendant Breaux' motions were filed within two weeks after the appointment of counsel for him.

On February 13, 1968, co-defendant Larry Dale DeMary withdrew his former plea of not guilty and entered a plea of guilty. His brother, Kenneth DeMary, withdrew his former plea on March 20, 1968.

They each provided a considerable amount of information to the Government and subsequently became the Government's principal witnesses. On May 1, 1968, they were each sentenced to serve five years in the custody of the Attorney General of the United States.

Apparently not wanting to make a ruling which would affect trial proceedings in another District should the motions for a change of venue be granted, the Trial Court, on May 9, 1968, fixed June 12, 1968, as the hearing date on all motions for a change of venue. These motions were heard on that date. They were not decided until September 24, 1968. No further action of any significance was taken in this case until nearly a year after the ruling on the motion for a change of venue.

In August 1969, an indictment, also charging a single overall conspiracy of the same nature as that alleged in the instant cause, and even charging some of the same incidents as overt acts of the said alleged Western District conspiracy as had been said to be substantive offenses in the Eastern District indictment, was returned in the Western District of

Louisiana. The next month, defendant Prudhomme moved for a speedy trial in the Eastern District and the month following that he filed another motion for a change of venue to the Western District of Louisiana, urging as a basis for his motion that the then recently filed indictment in the Western District of Louisiana proved his previous assertion that the Eastern District of Louisiana was a *forum non conveniens* for the trial of this indictment since the same proof would be required to establish the charges in each District, except for the individual mailings alleged, and the majority of witnesses and defendants resided in the Western District.

It was not until October 8, 1969 (more than twenty-two months after Petitioner Hennigan filed his initial pretrial motions; exactly twenty-two months after Petitioner Shaheen filed his initial pretrial motions, including the motion for a speedy trial; seventeen months after Petitioner Morris' tardy motions were filed; and one year and two weeks after the Trial Court denied the motions for a change of venue) that the Trial Court even fixed a

date for a hearing upon the still unadjudicated motions. That hearing was set for November 11, 1969. It was not until the date of the hearing—seventeen months after the last of the initial pretrial motions were filed—that the Government got around to filing its responses to the defendants' pretrial motions. The delay until the date of hearing in the filing of these responses necessitated additional delays in order for defendants to reply to the Government's answers and memoranda and for counter-responses to be made by the Government. This memorandum exchange was not completed until January 27, 1970. The tardy filing of the Government's answers thus caused an additional delay of more than two months.

On February 27, 1970, more than two years after the deadline for filing defense motions and lacking one day from being two years from the date of the filing of defendant Breaux' late motions, the Trial Court ruled on all pending motions except the ones for severance, to dismiss the indictment because the grand jury was allegedly improperly constituted, and to dismiss for lack of prosecution

which latter motion had been urged at some point after defendant Prudhomme filed his motion for a speedy trial). Significantly, no ruling was ever made on any defendant's motion for a speedy trial.

Then, after the motions were heard and submitted, defense counsel started moving to withdraw from the case. In the Court below, the Government urged this to have been the cause of the delay subsequent to the motion hearings. However, before the majority of defense counsel were permitted to withdraw, the Government successfully staged the ouster of one lawyer who then represented three defendants. Counsel for one of those defendants, *i.e.*, the eventual trial counsel for defendant Trahan, was among the last attorneys to be appointed in this case. Counsel for Petitioner Shaheen, the only attorney who entered this case after the appointment of counsel to replace Trahan's ousted lawyer, required no continuance and was ready for trial a month and a half after his initial appearance in this case.

Trial did not commence until October 26, 1970 —more than three years after the indictment was returned. Clearly, seventeen months of this period (*i.e.*, the period between the filing of Dr. Morris' tardy motions and the Order of the Court fixing a date for the hearing on all unadjudicated defense motions) were caused by inaction of the Court and the prosecution, and an additional period of two and one-half months (the period between the filing of the Government's answers and memoranda in opposition to defendants' pretrial motions at the time of the hearing and the time when its last memorandum was filed in opposition to these motions) was caused wholly by the Government's failure to promptly answer defendants' pretrial motions until the date of the hearing.

B. The Multiple Conspiracy Issue.

The indictment in this case alleged one continuing overall conspiracy among all of the participants of some fourteen staged collisions (nine specifically alleged and five of which were withheld from defendants and presented against them

without warning in spite of their timely request for such information *via* bill of particulars). Significantly, one of the allegedly staged collisions was, at the close of the Government's case, found by the Trial Court to have been the result of an independent conspiracy. Of the five unalleged collisions which were proved as overt acts in furtherance of the alleged overall conspiracy, the grand jury in the Western District of Louisiana considered these to be the subject of yet another conspiracy than the one alleged in the Eastern District indictment which had been returned nearly two years before. There was overlapping in the mailings charged in the Eastern and Western District indictments, the same being made the subject of substantive counts in one indictment and of alleged overt acts in the other. Over the objection of petitioners, the Trial Court permitted evidence of all of these collisions to be introduced as overt acts of the alleged conspiracy. On its face, the above situation presents at least three separate conspiracies. An analysis of the evidence

adduced in the Trial Court, however, will show that each staged collision was a separate conspiracy even when it is viewed, as it must be, in the light most favorable to the Government.

The alleged incidents.

November 3, 1965—Bossier City

This collision involved Kenneth R. DeMary, Larry Dale DeMary, Mayo Perez, C. Danny McGee, Charles Winn and Sue Jefferson. Mayo Perez had been previously involved in setting up staged accidents in and around Lake Charles, Louisiana. He approached and spoke with Kenneth DeMary about this method of making fast money. Mayo Perez sought Kenneth DeMary and revealed to him this method of fraudulently obtaining money because Kenneth DeMary was reputed to know people in Bossier City, Louisiana, and he presumably could get participants for a staged collision in that part of Louisiana. Kenneth DeMary took Mayo Perez to DeMary's mother's house where his brother, Larry DeMary, was staying and told Mayo Perez to explain the scheme to his brother. They decided to go to Bossier City to stage an accident. After their arrival in Bossier City,

Kenneth DeMary saw Charles Winn and asked him to obtain a hitter vehicle and driver for a staged collision. Winn solicited Sue Jefferson to drive her car into the rear of his automobile. On the morning of the collision, Charles Winn picked up Ken and Larry DeMary, Mayo Perez and Danny McGee at the motel at which they were staying in Bossier City, drove to his apartment where Sue Jefferson awaited, went inside his apartment for a brief moment and returned with Sue Jefferson. Sue Jefferson followed Winn's car in her own car for about two blocks, then bumped into the back of Winn's car. Because she did not damage the car sufficiently she was told to hit the car again, harder. On the second try, she demolished her own car and caused $539.31 property damage to Winn's car.

None of the attorneys or doctors indicted in this matter were shown to have been involved in the planning stage of this collision or to have had foreknowledge of its intended occurrence. Kenneth DeMary testified that about a month before his case

was settled with Sue Jefferson's insurer, he told Petitioner Hennigan the collision was staged. Kenneth DeMary said his brother, Larry, was present and active in this discussion. Parenthetically, Larry DeMary did not corroborate Kenneth DeMary's testimony on this point even though the Court directly asked him if he had ever discussed the details of this collision with Petitioner Hennigan. Larry DeMary testified that there was no single overall superintending organizer or influence in this collision; that they just got together and did it.

Sue Jefferson was never involved in any other collision which is reported in the notes of evidence. Charles Winn was involved in only two others, one at Taylortown, Louisiana, and one in Shreveport, Louisiana. The record does not disclose that Danny McGee participated in any other collisions staged by either of the DeMary's. Mayo Perez was involved in only one other collision noted in the record and Larry and Kenneth DeMary both denied involvement in that one.

January 4, 1966—Lake Charles

This collision involved Woodrow Rutherford, Kerry Fridell, Nancy Keating, Lester Noel, Francis Esthay and Mayo Perez. The collision was planned by Mayo Perez and Francis Esthay. Both Kenneth and Larry DeMary denied any involvement or knowledge of this collision. This is the only staged collision in which Noel, Keating, Rutherford and Fridell are shown to have been involved. Significantly, this is the only case in which Petitioner Hennigan represented a client examined by one of the indicted physicians. The evidence further shows that Petitioner Hennigan did not refer any patient to either Dr. Morris or Dr. Perego.

January 5, 1966--Lake Charles

This is the collision staged by the brother of Kenneth and Larry DeMary. The Trial Court held that this collision was more than likely a separate and distinct conspiracy from that alleged to have been the source of all the other staged collisions in this case and entered a judgment of acquittal of all mailing counts involving that collision.

January 6, 1966—Lake Charles

This collision involved Ken and Larry DeMary, Francis Esthay, Robert DeVille, Theodore Filipski, Carroll Daley, William Trahan, Billy Wayne Ardoin, Roosevelt Prater and Jimmy Vital. This is the only staged collision in which Filipski, Daley, Prater and Vital were involved. Robert DeVille, Francis Esthay, Larry DeMary and Roosevelt Prater each solicited some of the participants for this collision at the direction of Kenneth DeMary. Kenneth DeMary instructed Roosevelt Prater to solicit Jimmy Vital to participate in this collision. None of the attorneys involved are alleged to have participated in the planning of this collision or to have had foreknowledge of its occurrence. None of them represented any of the claimants in their dealings with the insurance companies. Larry DeMary testified that he asked Dr. Perego, petitioner herein, to handle the medical examinations and reports in the cases of persons in the vehicles involved in this collision. Dr. Perego was the only indicted doctor involved in this collision. His pa-

tient of many years, Theodore Filipski, testified that Dr. Perego did not know the collision was staged and that if Dr. Perego had known he (Filipski) had participated in such an incident with his back condition as it was, Dr. Perego would have killed him. Ardoin was involved in only one other collision, the July 14th collision at Sulphur, Louisiana.

March 10, 1966—Pineville

Participating in this collision were Kenneth DeMary, Alvin D. Evans, Walter R. Borsch, Francis Esthay, Ferdie Rider, W. C. Spell and Anne DeVille. DeMary solicited Borsch. Esthay solicited Rider. Rider was taken to meet with Kenneth DeMary, Alvin Evans, Walter Borsch and Francis Esthay. Kenneth DeMary outlined how and where the collision was to occur. Rider, Spell and Anne DeVille were in the hitter vehicle. The persons involved used their own doctors and lawyers.

Rider subsequently discussed this case with Petitioner Hamilton, who represented Anne DeVille and W. C. Spell. Prior to the settlement, Rider told Hamilton the collision was staged. Petitioner

Hamilton, according to Rider, said he did not know it at the time he took the case and that after he got their case settled he would not deal with them further.

June 1, 1966—Lake Charles

Participating in this collision were Emile George, his wife, Jolene, Bobby Dummer and his wife, Lou Ann, Robert DeVille, Larry DeMary and A. L. Prudhomme. It was originally planned by Larry DeMary and Donna DeMary, who also solicited the George couple and Robert DeVille to participate. DeMary was assisted by Prudhomme to recruit the Dummers. Subsequent to a meeting of all the participants in this collision, which occurred at the DeMary residence, the participants departed and committed the fraudulent collision. This is the only collision in which the George couple and Lou Ann Dummer were involved. Both couples were treated by Dr. Morris and represented by Philip Shaheen, both petitioners herein. After suit was filed on behalf of the George couple, Petitioner Shaheen was told by Emile George that the collision

was staged. After intensive questioning, Petitioner Shaheen notified counsel for the defendant insurer of this information and of his intention to withdraw as counsel for plaintiffs. No suit was ever filed on behalf of the Dummer couple. Prudhomme and Bobby Dummer each participated in one other collision.

June 29, 1966—Iowa, Louisiana

This collision was planned by Larry DeMary, Donna DeMary and Kenneth DeMary. These three persons, assisted by Bobby DeVille and A. L. Prudhomme, recruited Nolan Breaux, Wayne Millington, Glenn and Iva Pitts, Jane LeJeune, Larry Rippond and W. C. Spell as physical participants. At the time, Mrs. Pitts was six months pregnant. The night before the accident, Larry DeMary met with the Pitts couple, told them what to do, and had them sign retainer contracts.

Nolan Breaux drove a car owned by Jane LeJeune on Interstate 10 from Lake Charles to Iowa, Louisiana, with all the other physical participants except Spell in that car. After he entered the Iowa exit, they were struck from the rear by a large tandem tractor-

trailer driven by W. C. Spell and owned by his employer Wayne Millington broke a soft drink bottle and intentionally inflicted a laceration upon his forearms.

All of the persons in the target vehicle were represented by attorneys Tunis and Loridans, separately applying herein for a writ of certiorari, and all of them except Nolan Breaux were treated professionally by Dr. Morris, petitioner herein. Breaux was treated by Dr. Perego, petitioner herein.

Suit was filed on behalf of claimants and immediately after giving his deposition, Nolan Breaux notified Tunis and Loridans that he was told the accident was staged. These co-defendant attorneys, upon receipt of this information, withdrew from further representation in this case.

The evidence shows this to be the only collision in which Glenn and Iva Pitts, Nolan Breaux Wayne Millington or Larry Rippond participated, although Millington was present when others were planned.

July 14, 1966—Sulphur

This collision was planned by Bobby DeVille.

He was assisted in this by Francis Esthay, William Trahan and Alice Reeves. DeVille and Reeves recruited Richard Stutes; DeVille and Esthay recruited Gloria Farque; DeVille, Trahan and Reeves recruited Henry Lane Roberts; and DeVille recruited Billy Ardoin.

Thereafter, the participants met DeVille at a motel in Lake Charles, Louisiana, and, after a discussion, everyone went to Sulphur, Louisiana, where Billy Ardoin drove a vehicle into the rear of a car driven by Roberts, in which Stutes, Farque and Reeves were guest passengers.

All of the participants in the target vehicle were referred to and represented by Petitioner Shaheen. Stutes, Reeves and Roberts were treated by Petitioner, Dr. Perego. Farque was treated by Dr. Morris, petitioner herein.

No suit was filed in this matter. Some time after Petitioner Shaheen gave notice of representation to the insurer, Stutes told Shaheen the collision was fraudulent and Shaheen notified Ferrell Attaway, resident adjuster for Traveler's Insurance Company, of Stutes' disclosure by telephone and

confirmed same by letter. The evidence indicates this to be the only collision in which Stutes, Farque and Reeves participated.

July 27, 1966—Lake Charles

Larry DeMary, assisted by Walter Busby, planned this collision and solicited the participants, Walter and Rosa Busby, Lidia Urdiales, William Trahan and Bobby Dummer. Dummer drove a vehicle into the side of another car in which the other participants were riding. No claimant was represented by any indicted attorney. Dr. Perego treated the Busby's and Miss Urdiales. Trahan was treated by Dr. Morris.

The record does not indicate any involvement in any other collision by either the Busby couple or Miss Urdiales; Dummer had previously participated in one other collision staged by Larry DeMary. No physical participant, except Trahan, testified in the trial of this cause.

The following five collisions were brought out as overt acts by the alleged conspirators:

February 17, 1966—Monroe

Kenneth DeMary, assisted by Alvin Evans,

planned this collision and recruited Elizabeth Chriseol, Annette Sweatt, Rodney Windham, Randall Meek, Rosemary Clark, Carolyn Tripp and one Brockwell to participate therein. Brockwell drove a truck into the rear of a car driven by Sweatt in which the remaining five physical participants were riding. The participants were then instructed by the planners, who arrived in a third vehicle, to get out and, upon their doing so, Brockwell was told to hit the car again.

All claimants were treated by physicians not indicted herein. Meek, Clark and Tripp were represented by Petitioner Hennigan; Chriseol, Sweatt and Windham were represented by counsel not herein indicted.

The record indicates that neither Brockwell nor any claimants herein participated in any other staged collisions, nor did they have any knowledge of any in which others had participated.

March 28, 1966—Shreveport

This fraudulent collision was arranged by Kenneth DeMary, Alvin Evans and Charles Winn.

Participants were Joe Sultan, Juanita Ezerneck, Ronnie Gallagher, Louise Holbrook, Betty Knight and Bobby Jack Young in the target vehicle and Walter Borsch, who drove the hitter vehicle which was owned by Kenneth DeMary. Ezerneck was treated by a doctor not herein indicted. No reference is made to the treating physician of any other claimant, if any. All claimants were represented by defendants Dennis and Loridans. Suit was subsequently filed against Kenneth DeMary. At the request of Kenneth DeMary, Petitioner Hennigan, his family attorney, requested DeMary's insurers to defend the suit. No judgment was ever rendered in that suit.

The record is devoid of any reference to other participation by any of the claimants in this collision. Borsch was involved in only one previous collision and none thereafter.

April 25, 1966—Lake Charles

Kenneth, Larry and Donna DeMary jointly planned and staged this collision. Participants who occupied the target vehicle were Dennis

LeJeune and Aubrey Myers, Donna DeMary and Larry DeMary. Larry DeMary recruited Billy Farris, the hitter vehicle driver. All claimants were treated by Petitioner Morris and represented by defendants Tunis and Loridans. Donna DeMary also consulted Dr. Harry E. Snatic, Jr., a dentist, relative to damage to her teeth.

May 25, 1966—Shreveport

This collision was planned and arranged by Kenneth DeMary and Alvin Evans. Participants in the target vehicle were Harrell Lindsey, driver, Linda Paranuk, Audrey Guatney and James Taylor; those in the hitter vehicle were Leaven Woods, driver, Lee Feaster and L. W. Weaver. In accordance with instructions received from Kenneth DeMary, Woods drove a large truck into the rear of the target vehicle. All of the participants were treated by a physician or physicians not herein indicted. All four persons in the target vehicle were represented by defendants Tunis and Loridans. Their claims were settled and paid in December of 1966. The two passengers in the hitter vehicle

were represented by Petitioners Hennigan and Shaheen, to whom the claims were referred in December 1966, approximately seven months after the collision occurred No advances whatever were made by counsel on these claims. After investigation of the facts and discussion with insurance company representatives, counsel concluded there was no insurance coverage. Said claimants were notified of this fact and they were informed that no further action would be taken in their behalf. The record does not show that the claims were ever settled or that suit was filed thereon.

The record is completely silent with regard to any other participation whatsoever in any manner by Paranuk, Guatney, Taylor, Woods, Feaster or Weaver in any other collisions.

July 17, 1966—Lucky, Louisiana

This collision was planned by Kenneth DeMary, assisted by Alvin Evans and Harrell Lindsey. Participants who rode in the target vehicle were Harvey Lindsey, driver, his wife, Jo Ann Lindsey, Lucille Lindsey, Susan G. Chapman, and Imogene Brantley.

Those in the hitter vehicle were Evans, David Howe and L. Evans. After a planning session at the home of Lindsey, Alvin Evans drove a truck into the rear of the target vehicle. All claimants were treated by a physician not herein indicted. They were represented by defendants Tunis and Loridans.

The record indicates no other participation of any kind by Harvey Lindsey, Jo Ann Lindsey, Susan Gaye Chapman or Lucille Lindsey.

From the same witnesses who furnished testimony that the professional people, petitioners herein, knew that the collisions were staged, the following testimony was adduced as to the nature of the various enterprises concerned. This testimony is confirmed by a mere inspection of the foregoing description of the collisions and the participants therein.

Kenneth DeMary testified that he was active in the Shreveport, Louisiana, area along with Alvin Evans, Petitioner herein. He testified that his brother, Larry, was separately and independently engaged with Mayo Perez and Donna DeMary in the

Lake Charles, Louisiana, area. He testified that from time to time he joined with Larry DeMary, Mayo Perez and Danny McGee. He testified also that there were some collisions in which he and Larry DeMary took no part.

Larry DeMary testified, when asked how many separate groups he knew about which were engaged in staging collisions (Tr. Vol. XII, p. 131):

> I guess, basically, you could say there were probably three or four of them because there was Ken's, there was mine, and then Poncho [Perez] and them had a little thing going, and Bobby [DeVille] and them finally got their own little thing going. I believe they tried to set up one or two.
>
> So, actually, I guess you could say there were four small groups.

No witness testified that he or she had been approached to participate in a series of collisions, nor did any witness testify that there was any discussion with them regarding the existence of a plan to stage a series of collisions to be participated in by others than themselves. In no instance did anyone receive anything in connection with a collision in which they were not a participant, either in the planning or performance of the staged

collisions. The evidence generally reveals that these collisions were set up one at a time, not as a part of a grand scheme to stage a succession of fraudulent collisions but as a succession of separate schemes to stage each individual collision.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court of Appeals on the speedy trial issue conflicts with applicable opinions of this Court.*

The opinion of the Court of Appeals relied primarily upon an opinion of another Panel of that Court, *United States v. Lane*, 465 F.2d 408 (5 Cir. 1972), which, in the view of the Court below, correctly applied the opinion of this Court in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Lane* case and the instant case are similar in many material respects. Petitioners respectfully contend, however, that there are material factors involved in this case which distinguish it from *Lane* should the latter case correctly state the law.

The *Lane* case involved a multi-count conspiracy indictment involving thirty-six alleged

conspirators, thirty of whom pleaded guilty and only five of whom went to trial on the indictment. The delay between indictment and trial in *Lane* was two years, seven months and five days; the delay here was only five and one-half months greater. Many defense motions were filed by the parties in *Lane* as well as in this case. While there were some "twenty-five assorted motions * * * filed by the various defendants" in the *Lane* case, App. A, p. 41, and there were only about ten different types of motions filed here, petitioners do not look to that fact as a distinction. Every defendant in a criminal case should be permitted to file and have appropriately answered by the Government and adjudicated by the Court every motion reasonably indicated by the peculiar facts of his case without forfeiting his right to a speedy trial. As in *Lane*, in this case there were numerous Government witnesses whose testimony had to be marshalled, many exhibits which had to be obtained and assembled, and several defense witnesses to whom the Government had to devote some time in preparation for cross-examination.

The enormity of the burden of preparing for trial, of course, must be considered in determining whether a person is being tried with reasonable promptitude. That is the meaning of the statement in *Barker v. Wingo, supra,* at 530, that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." The Constitution guarantees orderly expedition and not mere speed. *Powell v. Alabama,* 287 U.S. 45 (1932). But in this case, the Government secured cooperation from the principal actors, Kenneth and Larry DeMary, within five and one-half months after the indictment was returned. The remaining two and one-half years cannot reasonably be viewed as having been necessarily devoted to the investigation and preparation of this case for trial. It is obvious from the very fact, and petitioners regard this as the signal difference which distinguishes this case from *Lane,* the Government did not even act to answer the defendants' pretrial pleadings in this case until the day finally fixed for hearing on the unadjudicated motions more than a year and a

half after the motions were filed. Had the Government been proceeding with orderly expedition, it would not have permitted the Court to remain idle in this case for more than a year before entertaining the motions which remained unadjudicated after the Court denied defendants' motions for change of venue.

The Court below made reference to the fact that after the deadline for filing defense motions, as recently as two months before the hearing on the unadjudicated motions, some of the defendants were still filing motions for change of venue. The Court below disregarded the nature of those motions which were predicated upon the intervening occurrence in the Western District of Louisiana.

The Court below also adverted to the withdrawal of counsel following the hearings on the defendants' pretrial motions as cause for the delay in the prosecution of this case which justified the delays involved here. Those withdrawals occurred, however, because the withdrawing attorneys could not afford to close their offices during

the protracted trial indicated by the indictment herein. Had the motions for severance been granted, those attorneys would not have withdrawn. Had the motions for severance been entertained within a reasonable period of time after they were filed, the delays which would have occurred as a result of the withdrawal of the attorneys would have been reduced by exactly the same amount of time as the difference between the time the motions were actually heard in this case and the time they reasonably should have been.

Computing from the date Dr. Morris tardily filed his motions, the pretrial motions in this case were neither answered nor fixed for hearing by the Court, with the sole exception of the motion for a change of venue, for more than eighteen months after they were filed. There was no such interruption in the flow of the proceedings in the *Lane* case, relied upon and found to have been indistinguishable from the instant case by the Court below, and such interruption of the prosecution in this case is inexcusable. No authority of this Court approves such a delay. Such an

approval, implicit in the judgment and opinion of the Court below, should not be sanctioned by the refusal of this Court to act to correct it.

The Court below indicated it placed the factors causative of the delay in the balance and, on viewing the totality of circumstances, concluded the delay was not so great as to have denied petitioners' right to a speedy trial. Petitioners disagree with that conclusion and urge this Court to review the opinion below in order to bring it into conformity with the relevant jurisprudence of this Court.

No opinion of this Court now authorizes the Government to fail to file responses to defensive motions, or the Trial Court to fail to act upon those motions, and then regard the delay during the pendency of those motions to be attributed to the defendants merely because the motions were filed. That is the holding of the Court below in this case. Fully eighteen months of the delay in this case, which, significantly, is one half of the entire time between indictment and trial, was

attributable to the Government and the Court. That sufficiently establishes that the first two criteria of the *Barker* case favored the conclusion that the petitioners were denied a speedy trial.

The length of the delay was clearly sufficient to "trigger" inquiry into the other factors set forth in *Barker v. Wingo, supra,* at 530. *Strunk v. United States,* 412 U.S. 434 (1973), involved only ten months; *Moore v. Arizona,* No. 73-5002 (U.S.S.Ct.), 14 Cr.L. 4073 (Nov. 5, 1973), involved the same period as the instant case.

The Court below, in applying the third *Barker* criterion, said "Most of the motions now claimed to be a plea for a speedy trial were in fact motions to dismiss for failure to prosecute." App. A, p. 43. The first motion for a speedy trial, filed by Petitioner Shaheen, was filed on December 8, 1967. The last motion to dismiss for lack of prosecution was filed more than a full year before the trial of this cause was finally had. *Barker* held that a motion to dismiss for lack of prosecution was a clear assertion of the right to a speedy trial.

The delays in the prosecution of this case, ranging from one to more than two years, depending upon at what point with respect to which defendant the period is computed, under any fair reading of the *Barker* case occurred after petitioners had asserted their speedy trial right. In view of the holding that ten months, under the circumstances there, was a deprivation of the right to a speedy trial in the *Strunk* case, the year or more delay here without prosecution of this case amounted to a denial of petitioners' right to a speedy trial. The Court below was therefore erroneous in its assessment of this third factor in determining whether speedy trial had been denied to petitioners.

Other cases decided before and after the *Barker* case establish other speedy trial principles with which the opinion below is in conflict.

The Court below attributes the lengthy delay between the filing and disposition of the motions of the petitioners and other defendants in this case to them by reason of the filing of such motions. Assuming *arguendo* that such a position

could ever persuade a majority of this Court, it is not conceivable that such could happen in this case where the Government and the Court totally abdicated their duties to proceed with the motions filed by the defendants. It is unlikely, however, that such a position would ever be maintained by this Court for, in *Strunk v. United States*, *supra*, this Court found "that petitioner was responsible for a large part of the 10-month delay which occurred * * *," 93 S.Ct. at 2262, yet it looked to the respective duties of the parties and held that it is the Government's duty to provide a speedy trial and the resources to make that possible, even though the accused might seek to put off the confrontation as long as possible. *Ibid.*; *Barker v. Wingo*, *supra*; *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970).

The Court below, in regard to the fourth *Barker* criterion, "decline[d] to enter the thorny thicket of determining whether, and to what extent, 'prejudice' to the defendants' interests was a result of the delay" (App. A, p. 44 n. 40) because it determined that petitioners had been accorded a

speedy trial and because they had made no "specific showing of prejudice * * *." *Ibid.* Petitioners respectfully submit that such a negative approach to the determination of the factor of prejudice cannot square with the holding of this Court in *Barker v. Wingo, supra,* at 530, where this Court referred to a lengthy delay as being "presumptively prejudicial." The inference in the opinion below that it was the duty of petitioners to allege and prove prejudice is inconsistent with the doctrine of presumptive prejudice stated in *Barker.* When the delay is shown to be of an extraordinary length, it becomes the duty of the Government to justify the delay within the four *Barker* criteria, failing which the indictment should be dismissed. *Barker v. Wingo, supra,* at 531; *Strunk v. United States, supra,* 93 S. Ct. at 2263; *Dickey v. Florida, supra* (BRENNAN, J., *concurring,* Part IV). The necessity to correct the erroneous application of *Barker v. Wingo, supra,* made by the Court below in this respect is yet another reason why this Court should grant the writ of certiorari and review this case and firmly de-

clare the respective burdens of a defendant and the Government with respect to the showing of prejudice.

The opinion of the Court in *United States v. Marion*, 404 U.S. 307 (1971), provides no comfort to the Government. There, the Government, after learning of the alleged criminal conduct, spent a long time investigating its information before bringing a public accusation of crime. Following the indictment, the Government proceeded against the defendants there with orderly expedition. The separate opinion of Mr. Justice BRENNAN, however, indicated that if the delay involved in that case had occurred after the indictment was returned, the petitioner would have been entitled to the relief sought. That is the precise situation here. The Government first obtained the indictment, then, while petitioners were under public accusation of crime, proceeded leisurely to prepare for trial.

During the pendency of the indictment herein, the doctors were deprived their general licenses to practice medicine and were relegated to institutional practices. Each of the attorneys involved here have, to some extent, been professionally

injured and even ostracized from their associations with other attorneys and they have been financially injured by the loss of previous clients and the loss also of prospective clients they otherwise would have gotten.

This Court's opinions make it clear that prejudice to the defense of the criminal action is not the only factor to be placed in the balance when considering the fourth *Barker* criterion. Your Honors have said that prejudice to the accused's standing in the community or in their occupations, or even the prejudice resulting from anxiety and expenditure of large sums of money for criminal defenses are relevant considerations in determining whether a delay is prejudicial. *E.g., Klopfer v. North Carolina,* 386 U.S. 213 (1967); *Strunk v. United States, supra; United States v. Marion, supra,* at 320; *Moore v. Arizona, supra.*

Because the opinion of the Court below conflicts with the principles previously enunciated in the above-cited opinions of this Court, this petition for a writ of certiorari should be granted and the opinion below reviewed and brought into

conformity with the previous jurisprudence of this Court.

2. *The opinion of the Court of Appeals is in conflict with this Court's opinion in Kotteakos v. United States and with the opinions of other Courts of Appeals upon the issue of variance between the indictment and proof because of the existence of multiple, rather than the alleged, single, overall conspiracy.*

The Court below said, "It only confounds the law to try to characterize this in the figure of spokes, wheels, hubs, rims or chains." App. A, p. 23. This allusion to metaphorical description of the type conspiracies involved was made in response to petitioners' argument that here, as in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Government's case, at best, showed a pattern of conspiracies similar, when graphically depicted, to " * * * 'separate spokes meeting at a common center,' though we may add without the rim of the wheel to enclose the spokes." 328 U.S., at 755. In *Kotteakos*, this Court held the proof of the existence of the rim was essential to the proof of a single, overall conspiracy as alleged in the indictment in that case.

A definite distinction exists between a conspiracy of the "chain" type and one of the "wheel" type, with different application of principles in the different types of conspiracies. *See*, Note, "Federal Treatment of Multiple Conspiracies," 57 Col.L. Rev. 387 (1957). The above-quoted statement in the opinion below totally disregards the difference between the types of conspiracies and the principles relative to each.

Although each individual staged collision here depended upon a succession of actors for the successful accomplishment of its object, the object of each collision, just as the scheme involved in the *Kotteakos* case, was the immediate fruits of the individual chain of activity, not some general end to be attained by a succession of activities. The object in this case was, with regard to each proven conspiracy, no more than to attain the proceeds from the settlements or trial of each of the staged collisions, not all of them.

This case is of an even more compelling nature than was *Kotteakos* for the application of

the principles announced by this Court in that case for here there are at least four separate and distinct hub groups: Kenneth Demary and Alvin Evans; Mayo Perez and Danny McGee; Larry and Donna DeMary with Robert DeVille; and DeVille's activities which were separate from those with the DeMary's. *Kotteakos* involved but a single hub comprising but a single person.

Each of the separate hub groups involved in the indictment herein learned about the staged collision fraud from working with others who were engaged in that type activity. In this respect, this case is similar to *Rocha v. United States*, 288 F.2d 545 (9 Cir. 1961), where the participants learned of a scheme from participating in it with others, then ventured out on their own with other people to commit the same type crimes. The opinion of the Court below, holding that participation of the nature of that demonstrated by this case and by the *Rocha* case is a single conspiracy, the opinion below squarely conflicts with the Ninth Circuit's opinion applying this Court's opinion in *Kotteakos*.

The opinion below also squarely conflicts with

another Ninth Circuit opinion which is indistinguishable from the instant case. *Barnard v. United States*, 342 F.2d 309 (9 Cir. 1965). That case involved staged automobile collisions set up by one person. To the extent that there was but a single hub and a single hub figure, the rationale of that case, as it was said about *Kotteakos*, is even more applicable to the instant case where multiple hubs and hub figures are involved. If the multiple conspiracy doctrine is applicable when there is a single hub figure, then it must surely be applicable when there are multiple hubs. In *Barnard*, as here, there was no showing that any participant agreed to a succession of staged collisions, nor was there any showing of knowledge that the principal actor was involved in many similar schemes with other persons. The "rim" of the "wheel" conspiracy there alleged was, as in *Kotteakos*, similarly missing. That element is totally missing in the instant case as well.

With so many conspiracies radiating about so many hubs in juxtaposition, but not occupying the

same space, the danger of prejudice was so great that the Trial Court was, under the teachings of this Court in *Kotteakos*, obligated under Rule 14, F.R.Cr.P., to order a severance in order to avoid the prejudicial effects of transference of guilt across conspiratorial lines to participants of other proven conspiracies.

The Trial Court permitted the jury to proceed to judgment. That is clearly inconsistent with the jurisprudence when multiple conspiracies of the number shown here is demonstrated by the evidence. According to some authorities, the Trial Court was required, upon petitioners' motion for a judgment of acquittal, to order entry of such a judgment when the fatal variance is shown. *Barnard v. United States, supra,* at 313; *Rocha v. United States, supra; United States v. Varelli,* 407 F.2d 735 (7 Cir. 1969).

Absent proof of a common intent or agreement to commit a succession of staged collisions, the essential ingredient of a single conspiracy, *i.e.*, the proof of the existence of the "rim" about the "wheel," was absent. *Barnard v. United States,*

supra; United States v. Varelli, supra; both construing *Kotteakos v. United States, supra.*

In *Blumenthal v. United States,* 332 U.S. 539 (1947), this Court found that proving two separate "chain" conspiracies having overlapping personnel was not a fatal variance between the indictment and proof because the danger of prejudicial transference of guilt was not as great as in the *Kotteakos* case. There were at least eight separate conspiracies involved in *Kotteakos.* Since *Blumenthal,* this Court has never said whether more than two conspiracies, but fewer than eight, was a sufficient variance to require severance or acquittal. No guidelines have been established for determining when, if the number is not determinate, the *Kotteakos* rationale is applicable. This question is one of great importance to the administration of the Federal criminal law since it is one of a recurring nature which has received different treatment in the various courts inferior to this Court. The record in this case is adequate in every respect for this case to be the vehicle by which an expository opinion is made on

this point.

Moreover, the remedy in a situation such as that presented by this case is unclear. Should the indictment be dismissed? Should it be severed as to the particular defendants involved in each conspiracy? Or, should judgment of acquittal be the appropriate remedy? The opinions of the lower courts are in favor of each of these remedies. This case also provides the vehicle by which these questions may be resolved.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari for which application is herein made and, after briefs and argument thereon are entertained by this Court, it should reverse the convictions of petitioners and direct the appropriate relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE

I certify that five copies of the foregoing Petition for a Writ of Certiorari have been served upon the Solicitor General of the United States, by first class mail, this ____ day of January, 1974.

_____
Attorney for Petitioners

SUPREME COURT OF THE UNITED STATES

JAN 31

MICHAEL RODAK, JR.

OCTOBER TERM 1973

NO. 73-1170

ERNEST C. HAMILTON, ALVIN D. EVANS, DR. KENNETH LEE PEREGO, LLOYD E. HENNIGAN, JR., PHILIP J. SHAHEEN, JR., and DR. WILSON D. MORRIS,

Petitioners,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI